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Supreme Court, U.S.
FILED
071084 FEB 19 2008
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No. (1)

In The
Supreme Court of the United States

WILLIAM LELAND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a District Court, in considering a defendant's motion to withdraw his plea under Fed. R. Crim. P. 11(d)(2)(B) for reasons other than voluntariness,

> (1) must weigh the voluntariness of the defendant's plea against the strength of the defendant's reason for withdrawing the plea, as seven federal circuits require, or
>
> (2) should consider only the strength of the reason for withdrawal, as is the practice in five federal circuits.

LIST OF PARTIES

The parties in this matter are the Petitioner, William Leland, and the Respondent, the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case October 19, 2007.

OPINIONS BELOW

The decision of the United States District Court for the District of Maine denying the Petitioner's motion to withdraw his guilty plea is set forth in the Appendix at 35a. The decision of the United States Court of Appeals affirming this decision appears in the Appendix at 31a.[1] The recommendation of the Magistrate Judge on the Petitioner's claim that he was rendered ineffective assistance of counsel due to his lawyer's delay in filing the motion to withdraw appears at App. 13a. The decision of the District Court approving the Magistrate's Recommendation appears at App. 4a. Petitioner's claim that he suffered from The Court of Appeals' denial of a Certificate of Appealablity appears at App. 1a.

[1] The Appendix is identified as "App." throughout the remainder of this Petition.

JURISDICTION

The Petitioner seeks review of the judgment of the United States Court of Appeals for the First Circuit denying the Petitioner's request for a Certificate of Appealability on October 19, 2007. *Leland v. United States,* 07-2046 (1st Cir. Oct. 19, 2007). App. 1a. On January 4, 2008, Justice Souter extended the time within which the Petitioner was entitled to file his Petition for a Writ of Certiorari until February 16, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Court has specifically recognized it may review, on certiorari, the denial of a Certificate of Appealability by a federal court of appeals under § 1254(1). *Hohn v. United States,* 524 U.S. 236, 241 (1998).

STATUTORY PROVISIONS INVOLVED

This case involves the application of Fed. R. Crim. P. 11(d)(2)(B), which addresses the circumstances when a defendant may withdraw his guilty plea after it has been accepted by a district court but before the defendant has been sentenced. This provision was initially added to the Federal Rules of Criminal Procedure, and was codified at Fed. R. Crim. P. 32(d), in 1983. This provision was later relocated to Rule 32(e) and finally to Rule 11(d)(2) in 2002 with no substantive changes.

The text of Fed. R. Crim. P. 11(d)(2) appears below:

> **(d) Withdrawing a Guilty or Nolo Contendere Plea.** A defendant may withdraw a plea of guilty or nolo contendere:
>
> **(1)** before the court accepts the plea, for any reason or no reason; or
>
> **(2)** after the court accepts the plea, but before it imposes sentence if:
>
> **(A)** the court rejects a plea agreement under Rule 11(c)(5); or
>
> **(B)** the defendant can show a fair and just reason for requesting the withdrawal.

STATEMENT

A. The Factual and Procedural Background

On January 27, 2004, the Petitioner, William Leland, entered pleas of guilty to seven counts of possession of controlled substances, and a plea of guilty to one count of possession of a firearm by a convicted felon, in the United States District Court for the District of Maine. *United States v. Leland*,

370 F. Supp.2d 337, 339 (D. Me. 2005). The Petitioner asked his first attorney, Christopher Largay, to make a motion to the Court to withdraw his plea as early as June 2004. *Leland v. United States*, 495 F. Supp. 2d 124, 127-28 (D. Me. 2007).[2]

When the motion was finally filed by his attorney eight months later, on January 19, 2005, it asserted that there was newly discovered evidence providing a previously unknown defense and undermining the Government's case. *Leland*, 370 F. Supp. 2d at 340. Information the United States Attorney's Office provided the Petitioner after he entered his pleas revealed that the Petitioner's wife was having an affair with the Government's confidential informant. *Id.* The Petitioner thus discovered that his wife had a motive and opportunity to frame him on the possession charges. After his plea, the Government further provided the defense with information revealing that prosecution witnesses committed perjury in their grand jury testimony, which would have further undermined the case against the Petitioner. *Id.* at 341.

The District Court denied the Petitioner's request to withdraw his plea. *Id.* at 341-42. Using the First Circuit's five-factor test for evaluating motions to withdraw pleas, the District Court found that the Petitioner had provided an insufficient

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[2] The Petitioner asserted that he made this request of his attorney in June 2004 as part of his ineffective assistance of counsel claim, but concluding that even if timely filed the motion would have been denied, the district court denied an evidentiary hearing. *Leland*, 495 F. Supp. 2d at 127-28.

basis for withdrawing his plea. *Id.* The District Court put great weight, as First Circuit case law requires, on the voluntariness of the Petitioner's plea. *Id.* at 341. The District Court also found, however, that the Petitioner's motion was untimely as the Petitioner had discovered the evidence that formed the basis of his motion to withdraw his plea as early as July 27, 2004, while Mr. Largay first presented the motion on January 19, 2005. *Id.* at 345. An appeal was taken to the United States Court of Appeals for the First Circuit, which affirmed the District Court's application of the five-factor test without discussion. *United States v. Leland,* 196 Fed. Appx. 9 (1st Cir. 2006).

The Petitioner, represented by new counsel, then asserted, in the District Court, that his original lawyer, Largay, had rendered ineffective assistance of counsel by failing to timely file the motion to withdraw the plea. *Leland v. United States*, 495 F. Supp. 2d at 127. The Petitioner sought an evidentiary hearing to establish that he had, soon after learning of the new evidence, asked that Mr. Largay move to withdraw his plea. *Id.* The District Court held that even if the motion had been filed when the Petitioner claimed he requested it to be filed, the motion would have been denied. *Id.* at 127-28. The District Court therefore denied the Petitioner's request for an evidentiary hearing. *Id.* at 127.

The Petitioner sought to appeal this decision and the United States Court of Appeals for the First Circuit denied a Certificate of Appealability on October 19, 2007. *Leland v. United States,* No.

07-2046 (1st Cir. Oct. 19, 2007); App. 1a.[3] On January 4, 2008, Justice Souter extended the time in which the Petitioner was permitted to file a Petition for Writ of Certiorari until February 16, 2008.

In sum, the District Court's decision, which the First Circuit declined to review, concluded that the Petitioner did not suffer prejudice from his first attorney's delay as the motion would have been denied whenever filed. This conclusion was based upon the District Court's application of the First Circuit's five-factor test, which places heavy weight on the voluntariness of the plea, regardless of the basis for withdrawing it. The District Court's decision denying post-conviction relief rested on the district court's assessment that counsel's failure to timely file a motion to withdraw the defendant's plea did not prejudice the defendant as his motion would have failed, even if timely filed, under the First Circuit standard which places primary emphasis on voluntariness. *Leland,* 495 F. Supp. 2d at 127-28.

B. The Opinions Below

The opinions of the lower courts in this matter all depend on the First Circuit's interpretation of

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[3] This Court has recognized that a defendant may seek certiorari from the decision of a Court of Appeals denying a Certificate of Appealability. *Hohn v. United States,* 524 U.S. 236, 241 (1998).

Fed. R. Crim. P. 11(d), which governs a defendant's withdrawal of his guilty plea.[4]

Under Fed. R. Crim. P. 11(d)(1), a defendant may withdraw his guilty plea for any reason until it has been accepted by the District Court. Once the District Court has accepted the defendant's plea, under Rule 11(d)(2) it may be revoked prior to sentencing for a "fair and just reason."

As the First Circuit interprets Rule 11(d)(2)(B), five factors must be considered in deciding whether a defendant has demonstrated a "fair and just reason" for withdrawing his plea under Rule 11(d)(2):

1) whether the plea was voluntary, intelligent and knowing when made, and complied with Rule 11;
2) the force of the defendant's reasons for the change of the plea;
3) the timing of the request;
4) whether the defendant asserts actual innocence;
5) whether a plea agreement has been reached.

As the District Court further recognized in the instant case, under First Circuit's interpretation of

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[4] This rule was first codified at Fed. R. Crim. P. 32(d). *See* Fed. R. Crim. P. 32(d), 97 F.R.D. 245, 254 (1983). It was relocated to Rule 32(e) and in 2002 relocated to Rule 11(d)(2) but the substance of the rule has not changed. *See* Fed. R. Crim. P. 11, Practice Comment (2007).

Rule 11(d)(2)(B), "[w]hether the plea was voluntary, intelligent and knowing is the most significant of the five factors." *Leland,* 370 F. Supp. 2d at 341-42.

Using this standard, the District Court denied the Petitioner's request to withdraw his plea. Applying the heavy weight the First Circuit assigns to the voluntariness of a plea, the Court concluded that "[h]aving voluntarily, intelligently, and knowingly admitted the crimes, Mr. Leland cannot withdraw his guilty pleas because he now believes the Government could not have proven them." *Id.* at 343. The Court further observed, however, that the Petitioner's request to withdraw his plea was untimely, having been filed months after the Petitioner became aware of the evidence supporting it. *Id.* at 345.

Petitioner's subsequent counsel, Robert Napolitano, therefore argued that the Petitioner's previous counsel had been ineffective in failing to file the motion in a timely fashion. *Leland,* 495 F. Supp. 2d at 127. The District Court rejected the Petitioner's request for an evidentiary hearing to establish that he had requested his previous counsel to file the motion months before he did so. *Id.* at 127-28. The Court concluded that, even if timely filed, the motion to withdraw the plea would have been denied. *Id.*

The District Court therefore concluded that, under the First Circuit test, the strength of the Petitioner's reasons for withdrawing his plea was outweighed by the factor the Court considered to be

the most important: the voluntariness of the plea. The Petitioner, of course, was not basing his motion to withdraw his plea on a claim that his plea was involuntary. The Petitioner was asserting that newly discovered evidence provided a defense that he was unable to anticipate at the time he entered his plea.

REASONS FOR GRANTING THE WRIT

Fed. R. Crim. P. 11(d)(2)(B) permits a defendant to withdraw his guilty plea after it has been accepted by the trial court, but before sentencing, if the defendant demonstrates a "fair and just reason" for withdrawing the plea. This vague standard provides little guidance to trial courts, reflected in the conflict in the lower courts on the issue of whether voluntariness of the plea must be weighed against whatever grounds the defendant offers to support withdrawal. Seven federal circuits require a trial court to weigh the voluntariness of the plea against the reason the defendant offers for withdrawal; two of these circuits expressly identify the voluntariness of the plea to be the most important factor to be considered. Five federal circuits, to the contrary, consider voluntariness only if it is raised by the defendant as a basis for withdrawing his plea.

The focus on voluntariness by the majority of federal circuits appears to be inconsistent with the intent of the drafters of Rule 11(d)(2)(B). The Advisory Committee Note to the rule states that

withdrawal should be permitted "where the defendant now wants to prove a certain defense which he for good reason did not put forth earlier." Fed. R. Crim. P. 32(d), Advisory Committee Note, 97 F.R.D. 245, 312 (1983). The instant case illustrates that such a basis for withdrawing a plea would rarely be sufficient in the seven circuits that weigh voluntariness against any reason the defendant offers for withdrawal.

The instant case illustrates that weighing voluntariness substantially impairs a defendant's ability to withdraw his plea on the grounds of newly discovered evidence. The Petitioner sought to withdraw his plea in light of newly discovered evidence that provided him a defense previously unavailable and undermined the Government's case against him. The District Court weighed the voluntariness of the Petitioner's plea against the basis he offered for withdrawing it and denied the motion to withdraw. The Court concluded that "[h]aving voluntarily, intelligently, and knowingly admitted the crimes, Mr. Leland cannot withdraw his guilty pleas because he now believes the Government could not have proven them." *United States v. Leland*, 370 F. Supp. 2d at 343.

The issue before this Court has a large impact on the criminal justice system. Over ninety five percent of federal criminal cases are resolved through guilty pleas.[5] The issue that has divided

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[5] Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 Stan. L. Rev. 1409, 1415 (2003) (observing that 96.6% of all criminal cases in the federal system ended in guilty pleas in 2001).

the lower courts has substantial reliability implications. The seven federal circuits that weigh voluntariness against the strength of newly discovered evidence place more emphasis on the formalities of a Rule 11 plea hearing than on the risk of erroneous conviction. Recent developments in criminal justice have demonstrated that wrongful convictions are not limited to cases which proceeded to trial. Modern technology, and the Innocence Projects this technology has spawned, have revealed that even defendants who have entered constitutionally valid pleas have been incarcerated for crimes that they did not commit.[6] The interpretation of Fed. R. Crim. P. 11(d)(2)(B) by seven federal circuits relegates many newly discovered evidence claims to post-conviction proceedings, which are not equipped to provide a remedy in light of a possibility of factual innocence.[7]

I. THE CONFLICT IN THE LOWER COURTS.

The United States Courts of Appeals have developed conflicting tests to evaluate whether a defendant may withdraw his guilty plea under Fed. R. Crim. P. 11(d)(2)(B). In seven federal circuits, the voluntariness of a defendant's plea is a factor that must be weighed against whatever reason the

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[6] *See e.g.*,.Barry Scheck, *Cooley Innocence Project Kick Off*, 18 T. M. Cooley L. Rev. 167, 176 (2001) (describing plea by factually innocent defendant).

[7] *See Herrera v. Collins*, 506 U.S. 390 (1993) (recognizing that mere factual innocence cannot serve as a basis for a successful collateral challenge to a conviction).

defendant offers in support of his attempt to withdraw the plea.[8] In five federal circuits, by contrast, voluntariness is considered only if the defendant claims that the plea was involuntary.[9]

Fed. R. Crim. P. 11(d)(2)(B) describes the circumstances under which a defendant may withdraw his plea once it has been accepted by the District Court. The rule states that:

> A defendant may withdraw a plea

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[8] *See United States v. Padilla-Galarza*, 351 F.3d 594, 597 (1st Cir. 2003); *United States v. Spark*, 67 F.3d 1145, 1150 (4th Cir. 1995) (six-part test requiring consideration of voluntariness); *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984) (seven-part test including consideration of voluntariness); *United States v. Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991) (adopting Fifth Circuit's seven-part test); *United States v. Siedlik*, 231 F.3d 744, 749 (10th Cir. 2000) (using Fifth Circuit's seven-part test); *United States v. Freixas*, 332 F.3d 1314, 1318 (11th Cir. 2003) (four-part test which considers whether plea was knowing and voluntary); *United States v. West*, 392 F.3d 450, 455 (D.C. Cir. 2004) (using three-part test which considers, as most important factor, "whether the guilty plea was somehow tainted.").

[9] *See United States v. Rosen*, 409 F.3d 535, 546 (2d Cir. 2005) (invoking three-factor test that does not require trial court to consider voluntariness unless raised as basis for withdrawal); *United States v. Brown*, 250 F.3d 811, 815 (3d Cir. 2001) (using three-factor test that does not consider voluntariness); *United States v. Fitzhugh*, 78 F.3d 1326, 1328 (8th Cir. 1996) (four-part test that considers voluntariness only if it serves as a basis for motion to withdraw); *United States v. Garcia*, 401 F.3d 1008, 1012 (9th Cir. 2005) (recognizing that voluntariness cannot be weighed against reason for withdrawal other than voluntariness). The Seventh Circuit has not adopted any test applicable to each attempt to withdraw a plea but has evaluated the merits of each case.

> of guilty or nolo contendere after the court accepts the plea, but before it imposes sentence if the defendant can show a fair and just reason for requesting the withdrawal.

Understandably, the broad equitable terms used in the rule have produced varying standards in the lower courts.

The First Circuit, in which Petitioner Leland sought to withdraw his guilty plea, is among the seven circuits that weigh the voluntariness of a defendant's plea against his reason for withdrawal, even if his reason has nothing to do with voluntariness. *United States v. Padilla-Galarza*, 351 F.3d 594, 597 (1st Cir. 2003). The First Circuit, and the D.C. Circuit, further regard the voluntariness of the defendant's plea to be the most important factor to be consider in evaluating the motion to withdraw, even when the reason for withdrawal is unrelated to voluntariness. *Id.*; *United States v. West*, 392 F.3d 450, 455 (D.C. Cir. 2004).

By contrast, five of the federal circuits look solely to factors assessing the strength of the defendant's basis for withdrawing his plea. Under the test used in these circuits, "the fact that a plea was voluntary, knowing and intelligent cannot count against a defendant's attempt to withdraw it prior to sentencing, unless the defendant's *only* asserted fair and just reason for withdrawing the plea is lack of voluntariness itself." *United States*

v. Garcia, 401 F.3d 1008, 1012 (9th Cir. 2005) (emphasis in original).

A. Seven Circuits Weigh Voluntariness Against Any Basis for Withdrawing a Plea

The seven federal circuits to consider voluntariness irrespective of the defendant's basis for seeking withdrawal have used a variety of multi-factored tests which consider a number of factors along with voluntariness. While these circuits have different formulations of the test, each requires a consideration of the voluntariness of the plea along with other factors such as the timing of the motion, strength of the defendant's reasons for seeking withdrawal, and prejudice to the government. When the defendant offers a reason, other than voluntariness for withdrawing his plea these circuits weigh the voluntariness of the plea against the defendant's reason to determine whether it is a "fair and just reason" to withdraw the plea.

The most common of these multi-factor tests was announced in *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984). The *Carr* test specifically requires voluntariness, as well as ineffective assistance of counsel and an assertion of innocence to be weighed in considering whether to permit a defendant to withdraw a plea. The *Carr* test, used in four circuits, requires the consideration of seven factors:

1) whether the defendant has asserted his innocence;
2) whether the government will be prejudiced if the motion is granted;
3) whether the defendant has delayed in filing the motion;
4) the inconvenience to the court if the motion is granted;
5) the quality of the defendant's assistance of counsel;
6) whether the plea was knowing and voluntary; and
7) whether the granting of the motion would cause a waste of judicial resources.

Carr, 740 F.2d at 343-44. *See also United States v. Spark*, 67 F.3d 1145, 1150 (4th Cir. 1995);[10] *United States v. Alexander*, 948 F.2d 1002 (6th Cir. 1991); *United States v. Siedlik*, 231 F.3d 744, 749 (10th Cir. 2000).

The remainder of these seven circuits provide shorter lists of factors that must be considered but all include voluntariness. The Eleventh Circuit, for instance, has held that four non-exhaustive factors should be considered. A trial court should at least examine whether:

(1) close assistance of counsel was available;
(2) the plea was knowing and voluntary;
(3) judicial resources would be conserved;

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[10] The Fourth Circuit considers exactly the same factors as the Fifth, Sixth, and Tenth, combining the consideration of the inconvenience to the court and potential waste of judicial resources into one factor. *Spark*, 67 F.3d at 1150.

and
(4) the government would be prejudiced if the defendant were allowed to withdraw his plea.

The First Circuit and the D.C. Circuit require similar considerations but each expressly requires a trial court to place the greatest weight on the voluntariness of the plea. *Padillo-Galarza*, 351 F.3d at 597; *United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("If we determine there was no error in the taking of the defendant's plea, we will be extremely reluctant to reverse the district court, even if the defendant makes out a legally cognizable defense to the charge against him.")

The District Court in the instant case described the First Circuit's test as having the following five factors:

1) whether the plea was voluntary, intelligent and knowing when made, and complied with Rule 11;
2) the force of the defendant's reasons for the change of the plea;
3) the timing of the request;
4) whether the defendant asserts actual innocence;
5) whether a plea agreement has been reached.[11]

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[11] The formulation of the test does not appear to require consideration of the prejudice to the government from the delay. Other First Circuit case law, however, recognizes that prejudice to the government is a factor to be considered in deciding whether a plea may be revoked under Rule

The D.C. Circuit has formulated a three-part test that mirrors the First Circuit test in substance, and which considers:

1) whether the defendant has asserted a viable claim of innocence;
2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and
3) whether the guilty plea was somehow tainted.

United States v. West, 392 F.3d 450, 455 (D.C. Cir. 2004).

All of the federal circuits to require consideration of voluntariness tend to restrict a defendant's ability to revoke his plea under Fed. R. Crim. P. 11(d)(2)(B) to situations in which there is a problem with the voluntariness of the plea. The First Circuit and the D.C. Circuit, which make voluntariness the most important factor to be considered, even more thoroughly limit the term "fair and just reason" to the single consideration of whether the plea was voluntarily given.

11(d)(2)(B). *See United States v. Padilla-Galarza*, 351 F.3d 594, 597 (1st Cir. 2003).

B. Five Circuits Consider Voluntariness Only if the Defendant Seeks to Withdraw his Plea on the Basis that it Was Involuntary

The Second, Third, Seventh, Eighth, and Ninth Circuits explicitly or implicitly recognize that under Fed. R. Crim. P. 11(d)(2)(B) a court should consider voluntariness only if it is raised by the defendant as the reason for withdrawal.

The Ninth Circuit has succinctly summarized the justification for not weighing voluntariness against a reason for withdrawal unrelated to voluntariness:

> [T]he fact that a plea was voluntary, knowing and intelligent cannot count against a defendant's attempt to withdraw it prior to sentencing, unless the defendant's *only* asserted fair and just reason for withdrawing the plea is lack of voluntariness itself. To conclude otherwise would render a motion to withdraw a plea prior to sentencing nothing more than an expedited hearing on a challenge to the voluntariness of the plea.

Garcia, 401 F.3d at 1012 (emphasis in original). *See also United States v. Ortega-Ascanio*, 376 F.3d 879, 884 (9th Cir. 2004).

The Second, Third, and Eighth Circuits, like many other circuits, use a multi-factor test to evaluate a defendant's motion under Rule 11(d)(2). The factors used in none of these circuits consider voluntariness of the defendant's plea in evaluating his 11(d)(2) motion, unless voluntariness is the basis for the motion.

The Second Circuit looks to whether the defendant asserted his innocence, the time that has elapsed between the plea and the motion and whether the government would be prejudiced if the motion were granted. *United States v. Rosen,* 409 F.3d 535, 546 (2d Cir. 2005). *Rosen* recognized that the voluntariness of the plea did not have to be considered if not raised as a ground for withdrawal. The Court in *Rosen* noted that "Courts may also look to whether the defendant has raised a significant question about the voluntariness of the original plea. . ." *Id.*

The remainder of the circuits to have considered the issue have similarly developed tests that consider voluntariness, or other possible grounds for withdrawal, only if raised. Under the Third Circuit test, a district court is to consider:

1) whether the defendant asserts his innocence;
2) the strength of the defendant's reasons for withdrawing the plea; and
3) whether the government would be prejudiced by the withdrawal.

United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001).

The Eighth Circuit formulates its test as follows:

1) whether the defendant established a fair and just reason to withdraw his plea;
2) whether the defendant asserts his legal innocence of the charge;
3) the length of time between the guilty plea and the motion to withdraw; and
4) if the defendant established a fair and just reason for withdrawal, whether the government will be prejudiced.

United States v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996).

The Seventh Circuit imposes a heavy burden on any defendant seeking to withdraw his plea under Rule 11(d)(2), regardless of reason he offers for withdrawal. *See United States v. Messino*, 55 F.3d 1241, 1248 (7th Cir. 1995) (recognizing "heavy burden of persuasion"). The Seventh Circuit has not adopted a test for evaluating whether a defendant ought to be allowed to withdraw his plea. The Seventh Circuit has instead recognized a variety of reasons that constitute an appropriate basis for withdrawing a plea.

The defendant's ability to withdraw his plea in the Seventh Circuit turns on an analysis of the strength of the reason the defendant asserts, not a weighing of extent of the voluntariness of the plea

against the defendant's reason for withdrawing the plea.[12] *See United States v. Carroll*, 412 F.3d 787, 792-93 (7th Cir. 2005) (recognizing that actual innocence is a basis for withdrawing plea but finding defendant had not sufficiently demonstrated claim); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007) (recognizing that prosecutor's unreasonable refusal to make §5K1.1 motion for reduced sentence for substantial assistance is a "fair and just reason" to withdraw plea); *United States v. Ellison*, 835 F.2d 687, 692-93 (7th Cir. 1987) ("One 'fair and just' reason for withdrawing a plea is where that plea was not voluntarily made.")

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[12] It would certainly be possible to characterize the Seventh Circuit as weighing the voluntariness of the plea against every reason the defendant offers for with withdrawal. The Seventh Circuit does describe the defendant as having a heavy burden as a result of the Court presuming that the facts provided in the plea colloquy to be true. *See United States v. Logan*, 244 F.3d 553, 558 (7th Cir. 2001) ("The presumption of verity of a defendant's statement in pleading guilty is overcome only if the defendant satisfies a heavy burden of persuasion."). But rather than weighing the voluntariness of the plea against the reason for withdrawal, the Seventh Circuit imposes a very high burden on *all* attempts to revoke pleas. *Id.* The circuits that require voluntariness to be considered in all 11(d)(2) motions therefore have a preference for voluntariness claims that the Seventh Circuit does not seem to have. The Seventh Circuit seems to disfavor *all* reasons for withdrawing a plea.

II. THE HISTORY OF THE 1983 AMENDMENT TO THE RULES OF CRIMINAL PROCEDURE SUGGESTS THAT THE MAJORITY MIS-INTERPRETED "FAIR AND JUST REASON"

The conflict in the lower courts is a function of the ambiguity in the "fair and just reason" standard in Fed. R. Crim. P. 11(d)(2)(B). The term "fair and just reason" is a broad one not susceptible of clear application. The drafters of the Federal Rules of Criminal Procedure therefore left a standard likely to produce discord in the lower courts.

The drafters did, however, endeavor to produce a standard "more generous" than the one a defendant must meet to withdraw his plea post-sentencing. Fed. R. Crim. P. 32(d), Advisory Committee Note, 97 F.R.D. 245, 309 (1983). Practically, weighing the voluntariness of a defendant's plea against reasons for withdrawal places great emphasis on voluntariness. The Ninth Circuit has contended "to hold that a defendant has not shown a fair and just reason for withdrawing his guilty plea if the plea was voluntary . . . improperly limits 'a fair and just reason' to only those cases in which the plea is [constitutionally] invalid." *Orteda-Ascanio,* 376 F.3d at 884. Even if the majority rule does not make voluntariness the sole consideration, weighing voluntariness against reasons for withdrawal unrelated to voluntariness renders a number of otherwise "fair and just

reasons" inadequate because the plea satisfied the constitutional requirements. The majority rule therefore seems at odds with the "generous" rule the drafters of Fed. R. Crim. P. 11(d)(2)(b) intended to create.

A. The Drafters of the Rules of Criminal Procedure 11(d)(2)(B) Produced an Ambiguous Standard Likely to Create Lower Court Conflict

The 1983 amendment to the Federal Rules of Criminal Procedure resolved a circuit split over whether the defendant ought to be required to provide a "fair and just reason" for withdrawing his plea prior to sentencing. Lower courts that required a "fair and just reason" were divided prior to 1983 about what the term "fair and just reason" required a defendant to demonstrate. The amendment did not resolve this dispute.

Prior to 1983, the Federal Rules of Criminal Procedure did not expressly require a defendant to provide any reason for withdrawing his guilty plea. Charles Alan Wright, Nancy J. King, Susan R. Klein, & Sarah N. Welling, Federal Practice & Procedure § 538 (2007). Prior to the 1983 amendment, some federal courts concluded that no reason at all was required to withdraw a guilty plea.[13] Others concluded that a "fair and just

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[13] *Gearhart v. United States*, 272 F.2d 499, 502 (D.C. 1959); *United States v. Savage*, 561 F.2d 554, 556 (4th Cir. 1977); *United States v. McGirr*, 434 F.2d 844, 847 (4th Cir. 1970); *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963).

reason was required."[14] *See* Note, *Pre-Sentence Withdrawal of Guilty Pleas in Federal Courts*, 40 N.Y.U. L. Rev. 759, 759 (1965) (observing conflict in the courts).

Courts that, prior to the 1983 amendment, required a "fair and just reason" to withdraw a plea interpreted the requirement in a variety of ways. A panel of the First Circuit held that the voluntariness of the defendant's plea should be considered whenever the defendant sought to revoke his plea prior to sentencing. *United States v. Kobrovsky*, 711 F.2d 449, 455 (1st Cir. 1983). The D.C. Circuit held that voluntariness was a relevant consideration – for any involuntary plea should always be withdrawn – but the Court noted that a voluntary plea merely placed a burden on the defendant to demonstrate the reason for the defendant's delay. *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir. 1976). The Fourth Circuit engaged in no analysis of the defendant's reason, unless the government was prejudiced by the withdrawal; if there was prejudice to the government, the Fourth Circuit weighed the defendant's reason against the prejudice the government would incur. *United States v. Strauss*, 563 F.2d 127, 130 (4th Cir. 1977). Other courts found that defendants had failed to demonstrate a fair and just reason using case-by-case analyses, rather than developing tests to interpret this standard. *See United States v. Bradin*, 535 F.2d

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[14] *United States v. Kobrosky*, 711 F.2d 449, 455 (1st Cir. 1983); *United States v. Bradin*, 535 F.2d 1039, 1040 (8th Cir. 1976); *United States v. Barker*, 579 F.2d 1219, 1223 (10th Cir. 1978).

1039, 1040 (8th Cir. 1976); *United States v. Michaelson*, 552 F.2d 472, 475-77 (2d Cir. 1977).

The 1983 amendment to the Rules of Criminal Procedure did not establish any of these decisions as the appropriate interpretation of the new rule. In requiring a defendant to provide a "fair and just reason" to withdraw his plea prior to sentencing, the Advisory Committee observed that it was providing a "more generous" standard to defendants than would be required post-sentencing. Fed. R. Crim. P. 32(d), Advisory Committee Note, 97 F.R.D. 245, 309 (1983).[15] This resolved the circuit split over whether a defendant was required to present a reason in order to withdraw his plea prior to sentencing but left intact the debate over the meaning of "fair and just reason."

The Advisory Committee Note recognized that the term lacked "any pretense of scientific exactness" but offered that certain factors should be considered in evaluating a motion to withdraw a plea. *Id.* at 312. Among those factors were whether the defendant asserted his innocence, the reason the new defense was not put forward at the time of the original pleading, the delay between the plea and the attempt to withdraw it, and any prejudice to the government from the delay. *Id.* at 312. The Committee further rejected the Fourth

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[15] Post-sentencing, a defendant may successfully attack his plea only by demonstrating that it suffers from "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 471 (1962).

Circuit's *Strauss* decision, observing that the text of the new rule required the defendant to offer a "fair and just reason" for withdrawal. The Committee therefore noted that the *Strauss* decision, which essentially required no reason at all for withdrawal absent prejudice to the government, was inconsistent with the new rule. *Id.* at 313.

Quite naturally, federal courts have arrived at conflicting tests to evaluate the vague standard "fair and just reason" the Federal Rules of Criminal Procedure have required of defendants seeking to revoke their pleas prior to sentencing.

B. Placing Great Weight on Voluntariness Is At Odds with the Intent of the Drafters of Fed. R. Crim. P. 11(d)(2)(B)

Despite the ambiguity intentionally left in Fed. R. Crim. P. 11(d)(2)(B), its drafters appear to have intended a more flexible rule than one that places such strong emphasis on the single factor of voluntariness.

The Advisory Committee observed that "[i]llustrative of a reason which would meet [the fair and just reason] test but would likely fall short of the §2255 test is where the defendant now wants to prove a certain defense which he for good reason did not put forth earlier." Fed. R. Crim. P. 32(d), Advisory Committee Note, 97 F.R.D. at 312. The test in the majority of the circuits has the practical effect restricting the grounds upon which a defendant may revoke his plea to cases in which

there is a problem with the voluntariness of the plea. The paradigm case the Advisory Committee presented for withdrawing a plea likely would not survive the standard now used in the majority of the circuits to interpret Fed. R. Crim. P. 11(d)(2)(B). The Petitioner' in the instant case unsuccessfully sought to withdraw his plea for precisely this reason contemplated by the Advisory Committee.

One federal circuit has observed that requiring a trial court to evaluate the voluntariness of a plea whenever presented with a Rule 11(d)(2) motion elevates voluntariness to the most important factor. The D.C. Circuit concluded that the standard used in the majority of circuits renders this factor dispositive in all but the most unusual cases. Prior to *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995), the D.C. Circuit had not expressly held that voluntariness was the most important factor to be considered in evaluating a motion to withdraw a plea. After the 1983 amendment to the Federal Rules of Criminal Procedure but prior to *Cray*, the D.C. Circuit had considered three factors: whether the defendant had asserted a legally cognizable defense, whether there was an error in taking the plea, and whether the government would be prejudiced by withdrawal. *Id.* Even without express recognition that voluntariness was the most important factor to be considered, the D.C. Circuit panel in *Cray* found that, as a matter of practice, voluntariness became the most important factor.

In *Cray*, the D.C. Circuit recognized it had reversed District Court's denial of plea withdrawals only in circumstances in which it found that the defendant had involuntarily entered his plea. *Id.* at 333-34. In light of this fact, the D.C. Circuit concluded that it would provide greater guidance to the lower courts if it expressly recognized what its cases were reflecting – that voluntariness was the most important and, in most cases, the dispositive factor to be considered. *Id.* at 334. Expressly recognizing voluntariness to be the most important factor to be considered, as both the First Circuit and D.C. Circuit have done, surely pushes voluntariness closer toward the exclusive basis for withdrawing a plea.

More than ninety-five percent of all federal criminal cases are resolved with guilty pleas.[16] Advances in science are further revealing the tragedy of wrongful convictions is not merely a myth reserved for detective shows. And, contrary to the intuitions of many, wrongful convictions are not limited to cases that proceed to trial. Recent history has revealed that wrongful convictions have arisen from pleas that are free from constitutional defects.[17] The focus of the First, Fourth, Fifth, Sixth, Tenth, Eleventh and D.C. Circuits on

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[16] *See* Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1064, 1064 (2006) (noting that number of pleas rose from 91% in 1994 to 96% in 2004).

[17] *See* Nancy J. King, *Regulating Settlement: What is Left of the Rule of Law in the Criminal Process?*, 56 DePaul L. Rev. 389, 395 (2007).

voluntariness, in some number of cases, elevates the formalities of the Rule 11 plea over the risk of an erroneous conviction. And rather than ensuring accuracy through a trial, the rule in these seven circuits, in a number of cases, requires the defendant to challenge his plea collaterally in a forum much more poorly suited to ensure the factually correct outcome.[18]

This Court should consider and reject the rule applied in seven circuits which undermines the language of Fed. R. Crim. P. 11(d)(2)(B) and greatly restricts the basis on which a defendant may revoke his plea prior to sentencing.

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[18] This Court has, in fact, recognized that claims of actual innocence cannot alone serve as the basis for a successful collateral challenge to a conviction. *Herrera v. Collins*, 506 U.S. 390 (1993).

CONCLUSION

The Petition for a Writ of Certiorari should be granted so that this Court may resolve the conflict in the lower courts over whether the voluntariness of a defendant's plea weighs against any reason he offers to withdraw it prior to sentencing under Fed. R. Crim. P. 11(d)(2)(B).

Respectfully submitted,

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United States Court of Appeals
For the First Circuit

No. 07-2046

WILLIAM LELAND,

Petitioner, Appelant,

V.

UNITED STATES,

Respondent, Appellee.

Before

Torruella, Lipez and Howard
Circuit Judges.

JUDGMENT

Entered: October 19, 2007

Petitioner William Leland seeks a certificate of appealability ("COA") to challenge the district court's denial, without an evidentiary hearing, of his motion for relief under 28 U.S.C. § 2255. He also contends that the district court erred in denying his motion to recuse.

Essentially for the reasons stated in the magistrate judge's June 13, 2007, Recommended Decision and the district court's July 5, 2007, order, we conclude that petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). The district court's determinations that petitioner failed to demonstrate entitlement to an evidentiary hearing and failed to show any valid basis for recusal are also unassailable. Accordingly, the request for a COA is denied and the appeal is terminated.

By the Court:
Richard Cushing Donovan, Clerk

By: MARGARET CARTER
Chief Deputy Clerk

Certified and Issued as Mandate
Under Fed. R.App. 41.

Richard Cushing Donovan, Clerk

/s/ signature illegible
Deputy Clerk

Date: 12/11/07

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WILLIAM LELAND, Petitioner	)
v.	) Criminal) No. 03-33-) B-W
UNITED STATES OF AMERICA, Respondent. Defendant.	) Civil No.) 07-10-B-W

ORDER ON PLAINTIFF'S MOTION FOR RECUSAL AND ON MAGISTRATE JUDGE'S RECOMMENDED DECISION

WOODCOCK, District Judge.

On January 29, 2007, William Leland moved to vacate, set aside or correct his sentence under 28 U.S.C. § 2255, asserting four grounds: (1) that the sentencing court erred in rejecting his motion to withdraw his guilty plea; (2) that his prior counsel gave him ineffective assistance by convincing him to plead guilty and entering into stipulations that curtailed the district judge's sentencing options; (3) that his prior counsel gave him ineffective

assistance by entering into a plea agreement that waived his rights of appeal and by unreasonably delaying the filing of a motion to withdraw his guilty plea; and, (4) *126 that his prior counsel gave him ineffective assistance by failing to keep him informed of the status of the case and failing to act in a timely manner. *Pet.'s Mot. to Vacate, Set Aside or Correct Sentence* (Docket # 1). On April 12, 2007, the Court referred the motion to Magistrate Judge Kravchuk and on June 13, 2007, the magistrate judge issued a recommended decision. *Recommended Decision on 28 U.S.C. § 2255 Mot.* (Docket # 8) (*Rec.Dec.*). On June 20, 2007, Mr. Leland objected to the Recommended Decision and also moved to recuse this Judge from ruling on the objection. *Pet.'s Obj. to Recommended Decision* 28 U.S.C. § 636(b)(1)(B) (Docket # 10) (*Pet.'s Obj.); Pet.'s Mot. for Recusal* (Docket # 9) (*Mot. for Recusal*).

I. Motion for Recusal

Mr. Leland moves for recusal because during sentencing, this Judge stated that he "reject[ed] emphatically any suggestion that Mr. Largay [Mr. Leland's prior counsel] was incompetent as to the Defendant's defense." *Mot. for Recusal* at 1 (quoting *Tr. of Sentencing Hr'g:* 16-17). Three of Mr. Leland's four claims are premised on Mr. Leland's contention that Mr. Largay rendered ineffective assistance of counsel and Mr. Leland argues that "[i]n light of these emphatic statements, it would be appropriate to have another Judge review the

Recommended Decision and preside over any further proceedings." *Id.* at 2.

In response, the Government correctly points out that Mr. Leland's claim is "contrary to longstanding legal rule and precedent in Section 2255 cases where post-conviction petitions are routinely and appropriately referred to judges familiar with the earlier criminal proceedings." *Gov't Opp'n to the Mot. for Recusal* at 1 (Docket # 12) (*Gov't Opp'n*). In *United States v. Mala*, the First Circuit wrote that "the trial judge, by reason of his familiarity with the case, is usually in the best position to assess both the quality of the legal representation afforded to the defendant in the district court and the impact of any shortfall in that representation." 7 F.3d 1058, 1063 (1st Cir.1993). Thus, "fact-specific claims of ineffective assistance ... must originally be presented to, and acted upon by, the trial court." *United States v. Leahy*, 473 F.3d 401, 410 (1st Cir.2007) (quoting *Mala*, 7 F.3d at 1063); *see also United States v. Leland*, 196 Fed.Appx. 9, 9 (1st Cir.2006).

Here, Mr. Leland presents a slightly different twist to the often rejected argument that the trial judge should not pass on § 2255 claims: he implies that because the trial judge previously expressed an emphatic view of the merits of the ineffective assistance issue, the judge should not review a subsequent objection based on the same argument. But, this contention, as refined, fares no better. First, the law does not prevent a judge from reconsidering a ruling; to the contrary, the law

provides numerous vehicles for a judge to reconsider a prior ruling, one of them being a § 2255 petition. *See* Rule 4, Rules Governing Section 2255 Proceedings ("The clerk must promptly forward the motion *to the judge who conducted the trial and imposed sentence ....")* (emphasis added).

Second, even though Mr. Leland raised his ineffective assistance of counsel argument at sentencing, this does not preclude an effective re-argument, based on further evidence, a transcript of the controverted proceedings, a reassessment of legal authority, a recasting of the prior argument, the development of new angles on the same question, and a persuasive presentation. The First Circuit has said that even a judge's "erroneous ruling will not ordinarily be enough to warrant a writ of mandamus to the judge to recuse himself *127 or herself." *In re United States,* 441 F.3d 44, 67 (1st Cir.2006).

Third, the Advisory Committee's Notes reflect that the proper procedure for a movant who contends that the judge should be recused should file "an affidavit of bias." Rule 4(a), Rules Governing Section 2255 Proceedings advisory committee's note. Here, no such affidavit was filed. *See In re United States,* 441 F.3d at 65 ("A motion to recuse is a very serious matter and must have a factual foundation....")

Finally, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." Liteky v. United States, 510 U.S. 540, 555,

114 S.Ct. 1147, 127 L.Ed.2d 474 (1994). Further, opinions "formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* To establish a bias or prejudice springing from the facts adduced or the events occurring at trial, the movant must demonstrate bias "so extreme as to display clear inability to render fair judgment." *Id.* at 551, 114 S.Ct. 1147; *Obert v. Republic Western Ins. Co.*, 398 F.3d 138, 145 (1st Cir.2005) ("[N]either lawyers nor litigants are entitled to *tabula rasa* judges."). A judge has a "duty not to recuse himself or herself if there is no objective basis for recusal." *In re United States*, 441 F.3d at 67. If motions to recuse were granted "too easily," one concern is that the movants may use the motion strategically "to obtain a judge more to their liking." *Id.* Here, Mr. Leland has presented "no objective basis" to support his motion to recuse.

The Court denies Mr. Leland's motion to recuse.

II. The Magistrate Judge's Recommended Decision

The Court also affirms the Magistrate Judge's Recommended Decision. Mr. Leland's main challenge is to the Magistrate Judge's recommendation against holding an evidentiary hearing. When he initiated his petition, Mr. Leland

urged that an evidentiary hearing "is necessary to clarify what actually took place in the relationship between the petitioner and his previous attorney." *Pet.'s Reply to the Gov't Resp. to the Mot. to Vacate, Set Aside, or Correct Sentence Pursuant to* 28 U.S.C. § 2255 at 1 (Docket # 7). In his objection to the Recommended Decision, Mr. Leland has focused on three specific issues that in his view justify an evidentiary hearing: (1) the timing of the motion to withdraw; (2) the failure to proceed with an appeal of the denial of the motion to withdraw; and, (3) the failure to keep petitioner informed, to take requested action, and misplaced reliance on *Booker*. *Id.* at 1-5.

In his objection, Mr. Leland concurs with the Magistrate Judge's conclusion that the "issues surrounding the withdrawal of the guilty plea have been exhaustively examined." *Pet.'s Obj. to Rec. Dec.* at 2 (Docket # 10). Mr. Leland stresses, however, that it is precisely for this reason that he seeks an evidentiary hearing; namely, to explore the underlying circumstances between his prior attorney and himself that should "drive [ ] further inquiry into the circumstances." *Id.* The problem is, however, that there is nothing in this record that would remotely suggest that such an inquiry would be fruitful. The prior denial of the motion to withdraw, and the Magistrate Judge's recommendation against this petition, accept the version of the chronology that Mr. Leland has consistently urged: that he demanded *128 that Mr. Largay, his prior attorney, move to withdraw his plea in June 2004, approximately six months

after he entered a guilty plea, and that Mr. Largay failed to act, waiting until January 19, 2005 to move to withdraw. However, as has repeatedly been made plain, even if the motion had been filed in June 2004, it would have been too late.

Mr. Leland now argues that the magistrate judge's analysis "elides the fact that time frame for withdrawal while important, is only one of five factors." *Id.* at 4. He states: "The District Court's inquiry on the issue was driven by the case law's presumption of a valid guilty plea and did not extend into the details of the counsel's actions *vis a vis* the Defendant." *Id.* This argument seems to imply that the delay in filing a motion to withdraw guilty plea is significant not for timing, but for one or more of the remaining four factors the Court must consider in evaluating whether a guilty plea should be withdrawn. If so, it is difficult to understand how trial counsel's delay in filing a motion to withdraw a guilty plea is relevant to factors other than delay. The same is true of Mr. Leland's contention that he was not adequately kept informed by his attorney as the case progressed, that Mr. Largay failed to undertake requested actions, and that he relied too heavily on the prospect of a dramatic change in the legal landscape following *Blakely* up to *Booker*.

But, there is no factual specificity to any of these arguments. Mr. Leland nowhere suggests what an evidentiary hearing would reveal to justify the relief he has requested. If the § 2255 petitioner wishes an evidentiary hearing, he must at a

minimum present a plausible basis to conclude that the evidence would lead to a different result. Here, Mr. Leland has asserted no factual basis for such a conclusion. *Cf.* *Owens v. United States*, 483 F.3d 48, 61 (1st Cir.2007) (holding that the district court abused its discretion in refusing to hold an evidentiary hearing, because the petitioner's allegations were not implausible, and a "final determination of the merits of [petitioner's] claim would be best served by greater development of the facts, many of which the Government disputes."). The Court concurs with the Magistrate Judge's recommendation against an evidentiary hearing, since the petitioner has failed to demonstrate that such a hearing would make a legal difference.

III. CONCLUSION

The Court has reviewed and considered the Magistrate Judge's Recommended Decision, together with the entire record; the Court has made a *de novo* determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and the Court concurs with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decision, and determines that no further proceeding is necessary.

1. It is therefore *ORDERED* that the Recommended Decision of the Magistrate Judge (Docket # 8) is hereby *AFFIRMED.*

2. It is further *ORDERED* that the Motion to Vacate, Set Aside or Correct Sentence (Docket # 1) be and hereby is *DENIED.*

3. It is further *ORDERED* that the Motion for Recusal (Docket # 9) be and hereby is *DENIED.*

SO ORDERED.

Dated this 5th day of July, 2007.

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)
	)
v.	) Criminal
	) No. 03-33-
	) B-W
WILLIAM LELAND,	) Civil No.
Defendant.	) 07-10-B-W

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

William Leland, who is serving a 252-month sentence for federal firearms and controlled substance offenses, has filed a petition pursuant to 28 U.S.C. § 2255 seeking to vacate the judgment of conviction entered in this court on October 31, 2005. Leland's petition, filed with the assistance of counsel who represented him at sentencing and on appeal, raises four grounds, the first, a reprise of his claim that he should have been allowed to withdraw his guilty plea, and three additional claims of ineffective assistance of trial counsel. Leland requests the court hold an evidentiary hearing because "a fact finding is necessary to sort out the exact sequence of events and decisions." (Reply Mem. at 6, Doc. No. 7). Seeing no need to hold an evidentiary hearing based upon the

existing record, I now recommend the court deny the request and also deny the motion to vacate the judgment.

Background

The background of this case can be found summarized in United States v. Leland, 370 F.Supp.2d 337 (D. Me. 2005) and United States v. Leland, No. 05-2670, 2006 WL 2709462 (1st Cir. Sept. 22, 2006). The First Circuit summarily denied Leland's direct appeal, noting that the District Court had accurately sized up the case when it issued its order denying Leland leave to withdraw his guilty plea. However, the First Circuit did note that Leland raised for the first time on appeal claims of ineffective assistance of counsel and that it would not consider such claims because they had not been raised in the District Court. Thus, the decision of the First Circuit bars further consideration of ground one of the 28 U.S.C. § 2255 motion and invites this court's close scrutiny of the other three grounds.

Discussion

1. The Withdrawal of the Guilty Plea

Leland claims he should have been permitted to withdraw his guilty plea and, apparently, that his attorney should have pursued

an interlocutory appeal of the District Court's denial of his motion to withdraw the guilty plea. The District Court carefully considered all of Leland's claims about why he should be allowed to withdraw his guilty plea and concluded there was no "fair and just reason for withdrawal." Leland, 370 F.Supp.2d at 347. There is no reason, absent ineffective assistance of counsel, to review that conclusion which has already been affirmed by the appeals court. Nor is there any reason to spill ink over the abortive attempts, both by counsel and by Leland, pro se, to take an interlocutory appeal of the decision denying leave to withdraw the guilty plea. The issues surrounding withdrawal of the guilty plea were ultimately fully considered on the direct appeal taken in a timely fashion after the imposition of sentence.

2. Counsel's failure to explain the contents of the plea agreement & to give proper advice regarding the entry of a guilty plea

The District Court was satisfied at the time of the Rule 11 proceeding that Leland had knowledge of the consequences of the guilty plea. Leland, 370 F.Supp. 2d at 342. The Court also found as a fact that before he pled guilty Leland had signed the plea agreement voluntarily, had read the agreement before he signed it, had understood all its contents, and had intended, at the time he signed the agreement, to agree to all its terms and conditions. Id. at 347. In light of this factual finding by the Court, Leland's conclusory

assertions to the contrary in ground two ring hollow. Leland does not provide any new factual assertions that were not already known to the Court by the time of sentencing hearing.

> "[T]he accuracy and truth of an accused's statements at a Rule 11 proceeding in which his guilty plea is accepted are 'conclusively' established by that proceeding unless and until he makes some reasonable allegation why this should not be so. Stated otherwise, we hold that a defendant should not be heard to controvert his Rule 11 statements in a subsequent § 2255 motion unless he offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statement[s]."

United States v. Butt, 731 F.2d 75, 80 (1st Cir. 1984) (quoting Crawford v. United States, 519 F.2d 347. 350 (4th Cir. 1975)).

Although he complains that he only pled guilty because his attorney "convinced" him to do so, that assertion alone does not amount to a claim of ineffective assistance in the face of this Court's findings regarding the voluntariness of the guilty plea. Butt, 731 F.2d at 80 n.5. ("Evidentiary hearings have been granted to § 2255 appellants who have claimed that their plea was induced by attorney misrepresentations only when the allegations were highly specific and usually

accompanied by some independent corroboration."). By the time of the sentencing, Leland was represented by new counsel who attempted to raise assertions about prior counsel's performance vis-à-vis the plea agreement. Regarding the stipulations about drug quantity and trial counsel's other alleged incompetence regarding the entry of the guilty plea which apparently forms the primary basis of this ground of ineffective assistance of counsel, the following exchange between Leland and the Court occurred at the sentencing hearing:

> MR. NAPOLITANO: He doesn't have to testify.
> THE COURT: Mr. Leland, just so you know, I--as I've indicated, I- - my impression of you is that you're a bright individual and that you follow an awful lot of this. But just so that I can limit you, because I don't want you to go on on matters that are not relevant to the Court, this is only on the issue of Christopher Largay. Your lawyer has brought a motion saying that I ought to, in effect, not enforce the stipulations that are set forth and which I've read earlier that are- -that are reflected in the plea agreement because of Mr. Largay's incompetence, all right? You have something you want to tell me on that?
> DEFENDANT: Yes, I do. On January 26th, about three o'clock

in the afternoon, we sat out back in one of these offices out here—
THE COURT: And that--this is the date of the plea?
DEFENDANT: Yes. We had gotten 3,000 pages of Jencks materials, and I was in a holding cell at the Penobscot County Jail. Mr. Largay come over for approximately an hour. We didn't have time to read the Jencks material at all. Then we had to meet with Mr. Perry and the DEA agent named Brian Tully [phonetic].
And at that agreement the only reason I pled guilty was because Mr. Perry said that he had enough evidence to arrest my son, and if I pled guilty, he would leave my son alone. And I asked him if I could plead guilty to just the charges I--that I had actually done, and he said, no, I have to plead guilty to the whole thing. And then I said to him, "Well, how about the quantity? I don't agree with the quantity." He said, "You can argue that at sentencing." I said okay. And come to find out, I got a Presentence Investigation Report about two months after I agreed to plead guilty because Mr. Largay told me that was the best thing to do, and he had never read the Jencks material either. I didn't know, your Honor, I got--I got an indictment, number one indictment, for

possession with the intent to distribute and the forfeiture. I was in the Piscataquis County Jail. Three or four months later I got a second- -a superseding indictment. I had no idea about those charges, what kind of evidence they had against me on those charges. And then about two months later, I got a third- -another superseding indictment, a second superseding indictment. Ultimately that one, the whole third indictment, got dropped on its own because Mr. Largay never put a motion in to drop it. It got dropped on its own. On its- - I don't know why. And I still don't know the counts, the evidence they had to which count, I never read the material. I was depending 100 percent on my lawyer because I was put in maximum security at state prison right after that I got the second superseding indictment. I only saw Mr. Largay three times in that time, in that time period. And it was for an hour each time. And I still right to this day I have no idea what evidence goes to what charge, who belongs to that charge. I still don't have any idea right to this day, your Honor, because I haven't had a chance to go over all of the material with my lawyer. And I was under the understanding that I could appeal. I was under the understanding that I

could argue at sentencing the amount of drugs that I was being charged for because I've never been caught with any drugs in my possession at my house or in my vehicle unless I got it- -that day that they got it on the initial stop. They just took the vehicle and then two days later they said they got a search warrant and that's what they found. But the stipulations that I couldn't--I couldn't argue quantity, that was never mentioned to me. Christopher Largay--that was put in paperwork against my knowledge. I didn't know that was put in there. I never read that. Mr. Largay just told me to sign it. I was rushed. This was three o'clock in the afternoon when we were having this plea agreement, and at four o'clock in the afternoon Bob Holt [phonetic] came out and told me we had better get this done now, and I asked him if we could continue it for tomorrow, and Mr. Perry said, "No, we're gonna be picking the jury tomorrow and you're gonna be going to trial, and I'm gonna charge your son with a crime." So I hurried up and pled guilty. I didn't get to read any of that paperwork. I was--I was told to sign it by my lawyer. And I was depending 100 percent on my lawyer.

(Sentencing Tr. at 24-27.)

Following Leland's statement, the Government's attorney reviewed with the court the transcript of the Rule 11 proceeding wherein Leland represented to the court that he fully understood the plea agreement and that he only signed it after reading the entire document. (Id. at 27-30). Leland explained his conduct at the time of the Rule 11 as follows:

> DEFENDANT: I did--I did tell you on January 27th that I read that because Christopher Largay told me to tell you. I didn't read--I didn't have time to read that. I was only in this room out back for less than an hour. And when Mr. Perry said that I was grasping at straws, you can reflect on the record that he did, in fact, arrest my son afterwards for a charge that happened two years before. So I'm not grasping at straws, I'm telling you the truth. He did say that, that he would leave my son alone, at that plea agreement. Christopher Largay will testify to that because Chris told me that. Thank you.

(Id. at 31).

After a pause lasting approximately five minutes, the Court ruled on Mr. Napolitano's motion to exclude consideration of stipulations with respect to quantity of drugs. (See Docket No. 327.) The basis of that motion was that trial counsel had rendered ineffective assistance when he entered

into stipulations regarding drug quantity that limited the defendant's right to have an evidentiary hearing with cross-examination of the witnesses involved in quantity allegations.

The Court noted the following:

> MR. NAPOLITANO: I think you've made a ruling on the motion.
> THE COURT: I did make that ruling on the motion.
> MR. NAPOLITANO: That ends the stipulation and the quantity argument.
> THE COURT: Well, your--the- -what I ruled on was your motion, which was filed on October 26th--
> MR. NAPOLITANO: Right.
> THE COURT: - -whether or not Mr. Largay's incompetence justified an effective withdrawal of the plea. And I've ruled that the earlier- -in effect, the earlier order which denied the motion to withdraw plea stands and is unaffected by the allegation that Mr. Largay was incompetent.
> MR. NAPOLITANO: The motion also addressed the stipulations, too, Judge. And I think you just made a ruling on that based upon the Rule 11 transcript.
> THE COURT: Well, let me-- let me address that briefly. Do you want to--do you want to argue that separately?
> MR. NAPOLITANO: No, that's fine, your Honor.

> THE COURT: Let me be specific about that issue as well because at pretrial--at the presentence conference the question of whether the stipulations that are reflected in the plea agreement would be enforced was raised.
>
> (Id. at 35-36).

This Court can draw on its own first-hand knowledge of counsel's earlier performance during the Rule 11 proceedings in weighing the merits of this claim. See United States v. McGill, 11 F.3d 223, 225 (1st Cir. 1993). Because Leland's written motion to vacate contains no new facts presented under oath and because of the Court's findings during the Rule 11 proceeding, the hearing on the motion to withdraw the guilty plea, and the sentencing proceedings, there is no reason for me to convene an evidentiary hearing on the question of ineffective assistance regarding the stipulations of fact in the plea agreement or trial counsel's advice regarding entry of a guilty plea. The Court has rejected the notion that Attorney Largay's performance fell below acceptable standards when he advised Leland regarding the stipulations and the entry of the guilty plea. Leland offers nothing new on that score by way of additional facts in his motion or memorandum.

3. Counsel's failure to file a timely motion to withdraw the guilty plea

Leland represents that once he realized the plea agreement locked him into a sentence without the right to appeal, he told his lawyer to file a motion to withdraw the plea. According to Leland his attorney kept putting him off and did not file the appeal until one year later. Leland notes that both the District Court and the Court of Appeals said that the lengthy time interval between the entry of the plea and the motion to withdraw was part of the rationale for denying the motion to withdraw the guilty plea. Once again the motion to vacate is not plowing entirely new ground because the sentencing court and the appeals court were both aware that Leland alleged at the time of the motion to withdraw the guilty plea that he had told his counsel he wanted to withdraw the plea at least approximately six months prior to the date when the motion was finally filed.

The District Court explained the chronology of events from the January 27, 2004, entry of the guilty plea forward to the motion to withdraw that plea on January 15, 2005, in the following terms:

> Following acceptance of the guilty plea, the Court ordered preparation of a Presentence Investigation Report. The Report was prepared on May 4, 2004 and revised on May 26, 2004. Following a June 14, 2004 Presentence Conference, the United States Supreme Court issued Blakely v.

> Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and the Court reset a Presentence Conference for July 20, 2004 to discuss Blakely implications. The parties agreed the case potentially presented Blakely issues and ultimately decided to await clarification from the United States Supreme Court. On January 14, 2005, after United States v. Booker, 543 U.S. 220 (2005), this Court reset the Presentence Conference for February 2, 2005 and on January 19, 2005, Mr. Leland filed the pending Motion to Withdraw Guilty Plea. The Defendant requested oral argument, which was held on March 10, 2005.

Leland, 370 F.Supp.2d at 340.

Leland now says that he told his attorney to file the motion to withdraw his guilty plea when he realized the plea agreement meant that he had waived his right to appeal his sentence.[1] He does not offer any allegations as to when that knowledge came to him or when he first instructed his counsel to file a motion to withdraw the guilty plea on that basis. However, it appears the record conclusively establishes the earliest date to have been June, 2004.

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[1] The Government points out that in fact Leland's right to appeal his sentence was never waived because the trigger for his waiver of that right was if the sentence imposed was less than 210 months. Because Leland was sentenced to 252 months the waiver did not apply. (See Docket No. 207, Plea Agreement ¶ 6).

The record provides this guidance on the issue. We can infer that by July 27, 2004,[2] Leland had definitely instructed his attorney that he wanted to file a motion to withdraw his guilty plea. (See Docket No. 290, Tr. Mt. Withdraw Guilty Plea, at 13-14.) Counsel made a strategic decision to "sit on" the motion until the Booker/Fanfan case was resolved. This court can make its own determination as to whether it would have made any difference if a motion to withdraw the guilty plea had been filed in June 2004 alleging the same grounds as the January 2005 motion and/or the additional grounds that Leland didn't understand he had waived his appeal rights regarding sentence if the sentence had been less than 210 months and his right to challenge the quantity of drugs by entering into the written stipulation. Indeed at the sentencing hearing this Court noted that Leland then contended that he had instructed his counsel to file the motion to withdraw the guilty plea in June 2004.

> THE COURT: The second allegation is that Mr. Largay failed to file a motion to withdraw the guilty plea in June 2004 when he was requested to do so by the defendant. The chronology here is that the defendant pleaded guilty on

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[2] There is some stray reference to a September 2004 presentence conference, but no such conference was ever held according to the docket. Either the post-Blakely July 27, 2004, conference or the pre-Blakely June 14, 2004, conference was the occasion when counsel first mentioned that Leland would be filing a motion to withdraw the guilty plea.

January 27, 2004. Mr. Leland states that he
requested Mr. Largay to file a motion to withdraw guilty plea in June of 2004. The motion was not filed, however, until January 19, 2005. The motion was based on five separate grounds: Newly-discovered evidence, discrepancy in Jencks material, seizure of film and camera, the mandatory nature of the Sentencing Guidelines at the time of the entry of the plea, and a failure to disclose crimes and activities of the Government's confidential informants. The question the Court has to ask itself and answer is whether the delay from June 2004 to January 2005 made a difference. And the answer to that is no. None of the issues raised in the motion to withdraw were changed with the delay with the exception of the Booker opinion which actually allowed the defendant to make the mandatory sentencing guideline claim which he could not have made had the motion been made in June of 2004. The Court's opinion of April 7, 2005, addressed the timing of the motion and noted that the delay between the plea and the motion was 12 months. And the Court in its order reviewed First Circuit authority on timing issues regarding the timing of the motion.

> The Court found cases in which the First Circuit has rejected as too long what it's- -what it terms the relevant temporal gap, where the gap was 8 months, 6 months, 5 months, 4 months, 14 weeks, 2 months, 8 weeks, 3 weeks and even 13 days. Under that analysis, the delay between January and June, a delay of approximately six months, would have been--would have not made a difference in terms of the Court's determination as to whether the motion was timely.

(Sentencing Tr. at 12-13.)

Given these findings by the Court and Leland's failure to allege anywhere in his current motion that he ever instructed his attorney to file a motion to withdraw the guilty plea prior to June 2004, an evidentiary hearing is not warranted. The Court essentially credited Leland's current version that all of the delay between June 2004 and January 2005 should be attributed to his counsel's "foot dragging" and still determined that there were inadequate grounds to allow the motion to withdraw the guilty plea. Thus, even though the Government argues the delay should be attributed to Leland's own strategic decisions and Leland maintains he was held hostage by his attorney, the resolution of that factual dispute would do nothing to change the legal issue before this court regarding revisiting the motion to withdraw the guilty plea.

4. Counsel's failure to keep petitioner informed, take action as requested, and misplaced reliance on Booker changing the legal landscape

The fourth ground of Leland's petition appears as a catch-all ineffective assistance claim hallmarked by prior counsel's general "inattentiveness." A claim stated in such broad generalities does not meet the Strickland v. Washington standard for ineffective assistance of counsel. 466 U.S. 668 (1984) (requiring a petitioner to establish both deficient performance and prejudice). In bringing this motion Leland has an obligation to "do more than proffer gauzy generalities or drop self-serving hints that a constitutional violation lurks in the wings." David v. United States, 134 F.3d 470, 478 (1st Cir. 1998). Leland's plaints give no detail at all as to specifically what his prior counsel did or did not do, let alone suggest how Leland was possibly prejudiced by the attorney's conduct.

Conclusion

For the reasons above I recommend that the Court **DENY** Leland 28 U.S.C. § 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

June 13, 2007.

/s/ Margaret J. Kravchuk
United States Magistrate Judge

United States Court of Appeals
For the First Circuit

No. 05-2670

UNITED STATES OF AMERICA,
Appellee,
v.

WILLIAM LELAND,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. John A. Woodcock, Jr., U.S. District Judge]
Before Selya, Circuit Judge
Siler,* Senior Circuit Judge,
and Howard, Circuit Judge

Robert M. Napolitano for appellant.
F. Mark Terison, Senior Litigation Counsel, with whom Paula D. Silsby, United States Attorney, was on brief, for appellee.

September 22, 2006

* Of the Sixth Circuit, sitting by designation

Per Curiam.

In a second superseding indictment, a federal grand jury in the District of Maine charged defendant-appellant William Leland with commission of an array of federal controlled substance and firearms offenses. See 21 U.S.C. §§ 841(a) (1), 846; 18 U.S. C. §§ 922(g) (1), 924(a) (2). On January 27, 2004, pursuant to the terms of a plea agreement that called for the government to move to dismiss one count of the indictment, the appellant entered guilty pleas to the remaining counts.

Almost a year later, in a motion filed on January 19, 2005, the appellant sought to withdraw his guilty pleas. Following a hearing, the district court, in a well-reasoned rescript, denied the motion. United States v. Leland, 370 F. Supp. 2d 337, 339-47 (D. Me. 2005) (concluding, inter alia, that the movant lacked a fair and just reason for his plea-withdrawal request) . On October 27, 2005, the court sentenced the appellant to serve a 252-month incarcerative term. This appeal followed.

We have long adhered to the view that when a trial court accurately sizes up a case, applies the proper legal rules, and articulates a persuasive rationale, "an appellate court should refrain from writing at length to no other end than to hear its own words resonate." Lawton v. State Mut. Life Assur. Co., 101 F.3d 218, 220 (1st Cir. 1996); accord, e.g., Cruz-Ramos v. P.R. Sun Oil Co., 202 F.3d 381, 383 (1st Cir. 2000); Ayala v. Union de Tronquistas, Local 901, 74 F.3d 344, 345 (1st Cir. 1996); Holders Capital Corp. v. Cal. Union Ins. Co. (In re San Juan

Dupont Plaza Hotel Fire Litig.), 989 F.2d 36, 38 (1st Cir. 1993). This case fits snugly within the confines of that principle. Accordingly, we affirm the judgment below for essentially the reasons elucidated in the district court's meticulous analysis of the plea-withdrawal request.

There is one loose end. On appeal — unlike in the lower court — the appellant claims that his former attorney provided ineffective assistance of counsel. A threshold problem stands in the way of this Sixth Amendment challenge: no such claim was advanced below. This court has ruled "with a regularity bordering on the monotonous [that] claims of ineffective assistance cannot make their debut on direct review." United States v. Mala, 7 F.3d 1058, 1063 (1st Cir. 1993). While the Mala rule admits of a narrow band of exceptions applicable to cases in which "the critical facts are not genuinely in dispute and the record is sufficiently developed to allow reasoned consideration" of a freshly minted ineffective assistance claim, United States v. Soldevila-Lopez, 17 F. 3d 480, 485 (1st Cir. 1994) (quoting United States v. Natenel, 938 F.2d 302, 309 (1st Cir. 1991)), this appeal plainly falls outside the compass of that band of exceptions. We therefore reject the appellant's ineffective assistance claim as premature, without prejudice, however, to his right to raise that claim,should he so desire, in a petition for post-conviction relief under 28 U.S.C. § 2255.

We need go no further. Having perused the briefs with care, entertained oral argument, and canvassed the record in its entirety, we find fully supportable the district court's conclusion that no

fair and just reason exists sufficient to justify withdrawal of the appellant's guilty pleas. Consequently, we affirm the judgment below, without prejudice, however, to the appellant's right to press his ineffective assistance of counsel claim in a collateral proceeding, as described above.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	CR-03-33
	)	-B-W
WILLIAM LELAND,	)	
Defendant.	)	

ORDER ON DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

On January 27, 2004, William Leland pleaded guilty to seven federal felonies. On January 19, 2005, Mr. Leland moved to withdraw his guilty pleas. Because Mr. Leland has not presented a fair and just reason for withdrawal of his guilty plea and because his motion is untimely, this Court DENIES the Defendant's Motion to Withdraw Guilty Plea.

BACKGROUND

On September 26, 2003, a Second Superseding Indictment issued charging the Defendant William Leland with seven counts of possession with intent to distribute a variety of controlled substances, including methamphetamine, Ecstasy, marijuana, oxycodone, and cocaine, one count of possession of firearms by a convicted felon, and a forfeiture count. On January 27, 2004, Mr. Leland plêad~~ed~~ guilty to six of the drug trafficking crimes and to the firearms possession charge; he

also consented to the forfeiture.[3] The Government agreed to dismiss Count IV, one of the drug trafficking charges, at sentencing.

A. Pre-Guilty Plea Events: April 15, 2003 – January 26, 2004

The charges against Mr. Leland were extensively and thoroughly litigated. On April 15, 2003, the Magistrate Judge ordered Mr. Leland detained pending trial (Docket No. 13). Mr. Leland unsuccessfully appealed this Order to this Court, (Docket Nos. 14, 22), and by interlocutory appeal, to the United States Court of Appeals for the First Circuit. (Docket Nos. 25, 46, 51). Mr. Leland moved for release of his vehicle (Docket No. 15), for local detention (Docket No. 18), for sanctions (Docket No. 24), to unseal the case (Docket No. 28), to suppress evidence (Docket No. 29), to disclose the identity of confidential informants (Docket No. 30), for a bill of particulars (Docket No. 42), again to suppress evidence (Docket No. 43), to sever Counts III and IV (Docket No. 44), for hearing on motion to suppress (Docket No. 54), for discovery and disclosure (Docket No. 55), twice for bail (Docket No. 81, 87), to appoint counsel (Docket No. 89), to dismiss (Docket No. 97), to sever and for relief from prejudicial joinder (Docket No. 98), to unseal document and view sealed response (Docket No.

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[3] This Court entered a preliminary order of forfeiture on January 29, 2004 and a final order of forfeiture on April 19, 2004. His Motion to Withdraw Guilty Plea makes no mention of the forfeiture count and at oral argument, Mr. Leland clarified that his motion was not directed to it. *Transcript of Oral Argument* at 12.

133), to strike a portion of the indictment (Docket No. 135), to amend detention order (Docket No. 171), and in limine (Docket No. 197). By Order dated November 19, 2003, the case was specially set for jury trial on January 25, 2004, for both jury selection and trial. (Docket No. 103, 107). On January 22, 2004, Mr. Leland filed a Motion to Continue Trial; the Court granted a continuance to January 29, 2004. (Docket Nos. 195, 198). On January 27, 2004, Mr. Leland entered a plea of guilty. (Docket No. 205).

B. The Guilty Plea: January 27, 2004

At the entry of the guilty plea, the Government presented a two page document entitled Government's Version of the Offense dated January 27, 2004, setting forth at a minimum the evidence it would have presented if the case had gone to trial. (Docket No. 206). In addition, the Government and Mr. Leland presented a plea agreement signed by Mr. Leland, his counsel, and the Government's counsel, consisting of eight pages, detailing the agreements of the parties. (Docket No. 207).

C. Post Guilty Plea Events: January 28, 2004 to Present

Following acceptance of the guilty plea, the Court ordered preparation of a Presentence Investigation Report. The Report was prepared on May 4, 2004 and revised on May 26, 2004.

Following a June 14, 2004 Presentence Conference, the United States Supreme Court issued *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) and the Court reset a Presentence Conference for July 20, 2004 to discuss *Blakely* implications. The parties agreed the case potentially presented *Blakely* issues and ultimately decided await clarification from the United States Supreme Court. On January 14, 2005, after *United States v. Booker*, 543 U.S. ---, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), this Court reset the Presentence Conference for February 2, 2005 and on January 19, 2005, Mr. Leland filed the pending Motion to Withdraw Guilty Plea. The Defendant requested oral argument, which was held on March 10, 2005.

D. The Motion

Mr. Leland's January 19, 2005 motion states five grounds for withdrawing his guilty plea and at oral argument, he added a sixth. First he received "newly discovered evidence" that his wife Ganessa Leland, was having an affair with one of the Government's confidential informants, conspired with the informant to put him in prison, and committed perjury at Mr. Leland's detention hearing and before the grand jury. Mr. Leland asserts that his wife had the "opportunity and apparent desire to place the alleged methamphetamine in the vehicle in which the Defendant was traveling." *Def. Motion to Withdraw* at 1. He contends he would not have entered the guilty plea if he had been aware of

these facts and he requested a testimonial hearing to develop the factual predicate for this claim.[4]

Second, in further review of the Jencks material, provided shortly before the plea hearing, the Defendant discovered "repeated weight changes, color changes, and packing differences in the alleged methamphetamine in the spare tire of the vehicle in which the Defendant was traveling." *Def. Mot. to Withdraw* at 2.

Third, Defendant asserts the Government seized the Defendant's camera and film and he contends these items contain exculpatory evidence. Despite numerous requests, they have never been turned over to him.

Fourth, the Defendant entered his guilty plea when the Sentencing Guidelines were mandatory; however, since the plea, the United States Supreme Court decided *United States v. Booker*, 543 U.S. ---, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), making the Guidelines advisory and allowing the sentencing court greater flexibility in imposing sentences outside the guideline range of sentence.

Fifth, the Defendant believes the Government failed to disclose all evidence "regarding the crimes and activities" of two confidential informants.

Sixth, the Defendant contends that Pamela Paradis, a co-conspirator, later admitted she had committed perjury at Mr. Leland's April 11, 2003 detention hearing and therefore, if his case had

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[4] This Court denies Mr. Leland's request for an evidentiary hearing on this issue. Even if the facts regarding Ganessa Leland are as he proposes, Mr. Leland's Motion to Withdraw would be denied.

gone to trial, he would have been able to impeach her credibility.

II. DISCUSSION

Rule 11(d) addresses the withdrawal of a guilty plea after the plea has been accepted, but before sentencing. Fed. R. Crim. P. 11(d)(2)(B). The Rule provides that at this stage a defendant may withdraw a plea of guilty if "the defendant can show a fair and just reason for requesting the withdrawal." [5] *Id.* A defendant has no absolute right to withdraw a plea, *United States v. Gonzalez,* 202 F.3d 20, 23 (1st Cir. 2000), and the burden of persuasion rests upon the defendant. *United States v. Castro-Gomez,* 233 F.3d 684, 687 (1st Cir. 2000); Whether to grant a motion for withdrawal of guilty plea rests in the sound discretion of the sentencing court and is reviewed for an abuse of discretion. *Castro-Gomez,* 233 F.3d at 686; *United States v. Ribas-Dominicci,* 50 F.3d 76, 78 (1st Cir. 1995).

The First Circuit has identified five factors to assess whether the defendant's reasons justify withdrawal: 1) whether the plea was voluntary, intelligent, and knowing when made, and complied with Rule 11; 2) the force of the defendant's reason for the change of plea; 3) the timing of the request; 4) whether the defendant asserts actual innocence; and, 5) whether a plea agreement has been reached. *United States v. Padilla-Galarza,* 351 F.3d 594, 597 (1st Cir. 2003); *Gonzalez,* 202 F.3d at 24;

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[5] Rule 11(d), which was formerly found in Fed. R. Crim. P. 32(e), also provides the defendant may withdraw his guilty plea before sentencing if the court rejects a plea agreement under Rule 11(c)(5), a circumstance not applicable here.

United States v. Richardson, 225 F.3d 46, 51 (1st Cir. 2000), *cert. denied* 531 U.S. 1203 (2001). Before allowing a defendant to withdraw his plea, the court must also consider the potential prejudice to the government. *Richardson,* 225 F.3d at 51; *Marrero-Rivera,* 124 F.3d at 347.

A. The Plea: Voluntary, Intelligent, and Knowing

Whether the plea was voluntary, intelligent and knowing is the most significant of the five factors. *Padilla-Galarza,* 351 F.3d at 597; *Richardson,* 225 F.3d at 51; *United States v. Cotal-Crespo,* 47 F.3d 1, 3 (1st Cir. 1995). To make this assessment, the courts will first review the Rule 11 hearing to determine whether the "court adequately observed the formalities imposed by Rule 11, which are intended to assure that the defendant understands the charge and the consequences of the plea." *Padilla-Galarza,* 351 F.3d at 597.

Rule 11(b) sets forth the district court's obligations in advising and questioning the defendant. Fed. R. Civ. P. 1 1(b)(1). Here, Mr. Leland does not claim any defect with the Rule 11 hearing itself.[6] Strict compliance with Rule 11 is "quite often dispositive in determining whether a defendant has knowingly and voluntarily entered a guilty plea." *United States v. Austin,* 948 F.2d 783, 787 (1st Cir. 1991). Based on Mr. Leland's

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[6] At oral argument, the Court asked Mr. Largay whether there is any allegation that the Rule 11 hearing itself was faulty. He responded: "not with regard to the hearing...." *Oral Argument Transcript* at 12.

concession and this Court's review of the Rule 11 colloquy, this Court concludes the formalities of Rule 11 were complied with at the hearing on January 27, 2004. This Court concludes there was an absence of coercion, Mr. Leland understood the charges, and had knowledge of the consequences of the guilty plea. *See United States v. Sahlin,* 399 F.3d 27 (1st Cir. 2005); *Cotal-Crespo,* 47 F.3d at 4; *see United States v. Santiago,* 229 F.3d 313, 317 (1st Cir. 2000) (quoting *United States v. Santo,* 225 F.3d 92, ,99 (1st Cir. 2000)); *United States v. Gose,* 260 F. Supp. 2d 209, 211 (D. Me. 2003).

B. The Force of the Defendant's Reasons

A defendant may not renounce his guilty plea "without advancing a plausible reason for so doing." *United States v. Doyle,* 981 F.2d 591, 594 (1st Cir. 1992). Plausibility, however, must "rest on more than the defendant's second thoughts about some fact or point of law, or about the wisdom of his earlier decision." *United States v. Parrilla-Tirado,* 22 F.3d 368, 371 (1st Cir. 1994) (citations omitted).

1. Strength of the Government's Case

Mr. Leland initially raised four issues addressing the strength of the Government's case against him: 1) Ganessa Leland's lack of credibility; 2) discrepancies in the Jencks material's descriptions of the methamphetamine; 3) the camera and film; and, 4) the backgrounds, including the criminal histories, of the

Government's confidential informants. At oral argument, he inserted a fifth issue: the credibility of Pamela Paradis, one of the Government's witnesses. *Transcript of Oral Argument* at 5-6. These contentions, however, miss the point. Mr. Leland admitted unequivocally that he was in fact guilty of each of the crimes to which he pleaded guilty.[7] He also admitted that the facts set forth in the prosecution version were true to his own personal knowledge.[8]

Having voluntarily, intelligently, and knowingly admitted he committed the crimes, Mr. Leland cannot withdraw his guilty pleas because he now believes the Government could not have proven them. For example, Mr. Leland makes an allegation about differing descriptions in the Jencks material of the methamphetamine found in the spare tire in the trunk of his car. But, the prosecution version alleges: A subsequent search of the spare tire located in the vehicle's trunk revealed a package containing approximately 703.5 grams of a substance containing

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[7] At the Rule 11 hearing, the Court asked Mr. Leland directly: "Now, Mr. Leland, have you pled guilty to Counts 1, 2, 3, 6, 8, 10, and 14 of the second superseding indictment in this case, because you are actually guilty?" Mr. Leland responded, "Yes." *Transcript of Rule 11 Hearing* at 4.

[8] At the Rule 11, the Court asked Mr. Leland: "I'm going to ask a very important question, Mr. Leland, and I want your honest answer. Is there any respect with which you disagree with what is set forth in the Government's version of the offense dated January 27, 2004?" Mr. Leland replied "No, sir." The Court went on: "Is the information contained in the Government's version of the offense dated January 27, 2004 true to your own personal knowledge?" Mr. Leland replied: "Yes, it is." *Transcript of Rule 11 Hearing* at 17.

methamphetamine. *Prosecution Version* at 2 (Docket No. 206). Having admitted this amount of this controlled substance was in the spare tire in his trunk, it is beside the point whether the Defendant knew then or learned later he might have made inroads on cross-examination into aspects of the Government's case. The same holds true of Mr. Leland's other contentions.[9]

It is "the policy of the law to hold litigants to their assurances." *Parrilla- Tirado,* 22 F.3d at 373. The law does not "permit a defendant to turn his back on his own representations to the court merely because it would suit his convenience to do so." *Id.* (quoting *United States v. Pellerito,* 878 F.2d 1535,

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[9] Mr. Leland's contention about the camera and film, originally a bit of a mystery, was cleared up at oral argument. Mr. Leland was returning from a trip to California, when his motor vehicle was stopped in Maine and methamphetamine was discovered in his spare tire. Apparently, when he was in California, he had a camera and took pictures. He contends these photographs would not show any evidence of drug dealing, but instead demonstrate he was in California for legitimate purposes. Mr. Leland says the Government confiscated the camera and film and refused to turn it over. However, this is a discovery issue. Mr. Leland was clearly aware of this issue, prior to entering his guilty plea. Mr. Leland has a demonstrated ability to exercise his legal rights. If he wished to make an issue of the camera and film prior to entering the plea, he could have done so. He cannot now withdraw his plea based on his earlier strategic decision not to press the issue. Moreover, his strategic decision was facially reasonable. It is not inconceivable a person committing a crime would photographically document its perpetration, but his failure to do so would be scant evidence that he did not commit the crime.

1539 (1st Cir. 1989)); *United States v. Martinez-Molina,* 64 F.3d 719, 733 (1st Cir. 1995) statements at plea hearing "carry a strong presumption of verity") ((quoting *Blackledge v. Allison,* 431 U.S. 63, 74 (1977)). Ordinarily, a defendant is "stuck with the representations that he himself makes in open court at the time of the plea." *Padilla-Galarza,* 351 F.3d at 598. Those representations are "more likely to be reliable than later versions prompted by second thoughts, and guilty pleas – often in the defendant's best interest – could hardly be managed any other way." *Id.* It is human nature for defendants to wonder what would have happened if they had put the Government to its proof and later to rue their decisions to plead guilty. But, defendants are not allowed, absent coercion or mistake, to "renege on plea agreements on the basis that they have miscalculated their risks and benefit or have belatedly discovered a new defense." *United States v. Muriel,* 111 F.3d 975, 981 (1st Cir. 1997). In *United States v. Allard,* 926 F.2d 1237, 1243 (1st Cir. 1991), the First Circuit wrote:

> In reaching a plea bargain, a defendant assesses the likelihood of conviction and balances that against the relative severity of the sentence he expects to receive pursuant to the agreement and that which could be imposed upon conviction. In many cases, that process results in a compromise pursuant to which the defendant makes a conscious decision to relinquish a perceived defense.... To hold otherwise would render plea

> agreements and the pleas entered pursuant to them meaningless.

See also Brady v. United States, 397 U.S. 742, 757 (1970) ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case...."). This Court concludes Mr. Leland has not presented a "plausible" reason for withdrawal of his guilty plea.

2. The *Booker* Argument

Mr. Leland pleaded guilty before *Booker* and he claims the changes of law wrought by *Booker* should allow a withdrawal of his guilty plea. The First Circuit, however, recently made short work of a similar argument. *Sahlin*, 399 F.3d at 30-31. Although *Sahlin* addressed a defendant who had been sentenced as opposed to one awaiting sentence,[10] the First Circuit noted that the "possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompany a guilty plea." *Id.* at 31. *Sahlin* is consistent with the longstanding principle that "a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." *Brady*,

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[10] As *United States v. Vonn*, 535 U.S. 55, 72 (2002) points out, the standards for plea withdrawals before and after sentence are different: Rule 11(d)'s "fair and just reason" standard hardens into Rule 11(e)'s "near presumption" after sentencing.

397 U.S. at 757. The First Circuit concluded Mr. Sahlin's *Booker* argument was "frivolous." *Sahlin,* 399 F.3d at 31. The pre-*Blakely* to post-*Booker* changes in the law standing alone do not state a "fair and just reason" for allowing the withdrawal of his guilty plea.

C. The Timing of the Motion

In Mr. Leland's case, the Court accepted his guilty plea on January 27, 2004 and the motion to withdraw was filed on January 19, 2005, nearly twelve months later. The First Circuit noted that a "long interval between the plea and the request often weakens any claim that the plea was entered in confusion or under false pretenses." *Gonzalez,* 202 F.3d at 24 (quoting *Doyle,* 981 F.2d at 595), *see also United States v. Isom,*85 F.3d 831, 838-39 (1st Cir. 1996). It has also noted that the "longer a defendant waits before moving to withdraw his plea, the more potency his motion must have in order to gain favorable consideration." *United States v. Gonzalez- Vazquez,* 34 F.3d 19, 23 (1st Cir. 1994) (quoting *Parrilla-Tirado,* 22 F.3d at 373 (1st Cir. 1994)).

The First Circuit has explained, however, the "relevant temporal gap" is not the time between the Rule 11 and the motion to withdraw but rather the time between the defendant's "discovery of new information and the filing of his motion." *Gonzalez,* 202 F.3d at 24. The First Circuit has rejected plea withdrawal motions in which the relevant gap was eight months, *Id.;* six months, *see Doyle,* 981 F.2d at 595 and *Parrilla-Tirado,* 22 F.3d at 373; five

months, *see United States v. Torres-Rosa,* 209 F.3d 4, 9 (1st Cir. 2000); four months, *United States v. Gonzalez- Vazquez,* 34 F.3d 19, 23 (1st Cir. 1994); fourteen weeks, *United States v. Marrero-Rivera,* 124 F.3d 342, 354 (1st Cir. 1997); two months, *see Isom,* 85 F.3d at 839; eight weeks, *see Pellerito,* 878 F.2d at 1541, and *United States v. Crosby,* 714 F.2d 185, 192 (1st Cir. 1983), *cert. denied* 464 U.S. 1045 (1984); three weeks, *see United States v. Keefe,* 621 F.2d 17, 18 (1st Cir. 1980); and, even thirteen days, *see United States v. Ramos,* 810 F.2d 308, 313 (1st Cir. 1987).

Mr. Leland's motion is untimely. It was filed nearly a year after his plea was accepted and eight months after the Presentence Report was completed. Before entering the guilty plea, Mr. Leland was aware the camera and film had not been turned over and he was in possession of the Jencks material.[11] At oral argument, Mr. Leland conceded that he was aware of the factual bases for all remaining allegations by the Presentence Conference in the summer of 2004.[12] *Transcript of*

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[11] Mr. Leland contends he did not have time to thoroughly review all the information in the Jencks material before the plea. The trial was originally scheduled for jury selection for January 26, 2004. Following receipt of the Jencks material, Mr. Leland moved to continue the trial to January 29, 2004 to allow more time to review the Jencks material. This motion was granted. Mr. Leland did not move for any additional time to review the Jencks material and entered his guilty plea on January 27, 2004. If Mr. Leland needed additional time to review the material the Government had disclosed, he should have asked for it before entering his guilty plea.

[12] Mr. Leland conceded he was aware of these matters by the time of the Presentence Conference. The Court

Oral Argument at 15. Although he could not have been aware of the precise contours of the *Booker* argument until the United States Supreme Court issued *Booker,* he was aware as of June 24, 2004, when the Supreme Court issued *Blakely,* of the issues *Booker* later resolved and could have raised them in a motion by the early summer of 2004 raised them in a motion by the early summer of 2004.[13]

For his own reasons, Mr. Leland elected to wait nearly one year after entering his guilty plea and months after receiving information that he now contends justifies his withdrawal of the plea. Applying First Circuit authority, Mr. Leland's motion is untimely. *Doyle,* 981 F.2d at 595("While an immediate change of heart may well lend considerable force to a plea withdrawal request, a long interval between the plea and the request often weakens any claim that the plea was entered in confusion or under false pretenses.").

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misspoke at the hearing and referred to the Conference as having taken place in September, 2004, when in fact the second Presentence Conference took place on July 27, 2004. If the July date is used, the motion was filed six months after the defendant had knowledge of the factual bases for the motion and if the September date is used, the motion was filed four months after he acquired knowledge. Using either date, the motion is untimely.

[13] It seems clear Mr. Leland was waiting to see how the Supreme Court resolved *Blakely* before filing his Motion to Withdraw Guilty Plea. It cannot be coincidental that Mr. Leland decided to file his motion on January 19, 2005, one week after the Supreme Court's decision in *Booker*. As pointed out, however, post-plea changes in the law do not in any event provide a basis to withdraw a guilty plea.

D. Whether the Defendant Asserts His Actual Innocence

Among the more troubling aspects of Mr. Leland's motion is the sequencing of his assertion of actual innocence. The First Circuit has said that courts will "look more hospitably on a motion to withdraw a guilty plea when the motion is coupled with an assertion of innocence." *Doyle,* 981 F.2d at 596. On the other hand, if the Defendant does not proclaim his actual innocence, this factor "cuts sharply against allowing appellant's motion to withdraw his guilty plea." *Parrilla-Tirado,* 22 F.3d at 373; *see Doyle,* 981 F.2d at 596. Mr. Leland's written motion referred somewhat obliquely to his actual innocence to the methamphetamine count. He wrote that his wife's affair with a confidential informant had given her the "opportunity and apparent desire to place the alleged methamphetamine in the vehicle in which the defendant was traveling." *Def.'s Mot. to Withdraw* at 2. He did not, however, directly assert he was innocent of the methamphetamine count or for that matter any other count.

At oral argument, this Court directly asked whether Mr. Leland was proclaiming his actual innocence of the crimes. *Transcript of Oral Argument* at 24. Mr. Largay's initial response was that his client was asserting his actual innocence only to the methamphetamine charge.[14] *Id.* After

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[14] By letter dated March 11, 2004, Mr. Leland wrote the Court directly. In that letter, he noted that the prosecutor had asserted he had 800 grams of methamphetamine in

further colloquy between the Court and Mr. Largay, Mr. Leland asked to speak with his attorney and after consultation, Mr. Largay represented to the Court that Mr. Leland is maintaining "his innocence with respect to more than that one crime." *Id.* at 30-31. Mr. Largay stated Mr. Leland is saying he did not even possess the firearm. *Id.* at 33-34.

This Court concludes Mr. Leland's maintenance of his innocence is purely opportunistic. He repeatedly admitted each crime at the Rule 11 on January 27, 2004. He reiterated in his own writing his commission of the methamphetamine crime by letter to the Court dated March 11, 2004. He did not clearly assert his actual innocence in the January 19, 2005 written motion. His first assertion of actual innocence came only after the Court's inquiry on the issue and then

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the spare tire of the vehicle. He wrote that "someone tampered with that because I only knew of a little over 200 grams." Mr. Largay objected to the Court's consideration of this letter on the ground of attorney-client privilege. The attorney-client privilege is well-established and its rationale straightforward. *XYZ Corp. v. United States (In re Keeper of the Records),* 348 F.3d 16, 22 (1st Cir. 2003). However, "the privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice. When otherwise privileged communications are disclosed to a third party, the disclosure destroys the confidentiality upon which the privilege is premised." *Id.* (citations omitted). Mr. Leland clearly waived any attorney-client privilege by writing the Court directly. There was no claim the Defendant himself did not write the letter. The Court has considered the March 11, 2004 Leland letter over his objection.

only to the methamphetamine count. Finally, after learning the potential significance of actual innocence during the oral argument, he altered his tactics and decided to proclaim he had not committed any crimes. In the Court's view, Mr. Leland's sudden change of mind was a transparent attempt to alter the facts to fit the legal criteria. This Court does not credit Mr. Leland's oral argument epiphany that he has been actually innocent all along.

E. Whether a Plea Agreement Was Entered Into and Breached

Mr. Leland does not dispute he entered into a plea agreement[15] and under *Gonzalez,* the signed agreement "casts further doubt on his claims." *Gonzalez,* 202 F.3d at 24. In *Ramirez-Benitez,* the First Circuit reviewed the contents of the plea agreement in tandem with the Court's inquiry at the Rule 11. *United States v. Ramirez-Benitez,* 292 F.3d 22, 28 (1st Cir. 2002). Here, the plea agreement contains not only the signature of the Government's attorney, but also the signatures of the Defendant and his attorney. During the Rule 11, Mr. Leland confirmed the Defendant's signature was his, he had signed the agreement voluntarily, he had read the agreement before he signed it, he understood all its contents, and by

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[15] This plea agreement was not a package plea and does not raise the same voluntariness concerns the First Circuit addressed in *United States v. Mescual-Cruz,* 387 F.3d 1 (1st Cir. 2004).

signing it he intended to agree to all its terms and conditions.[16]

The plea agreement set forth in detail the charges to which he was pleading guilty, the maximum and minimum terms of imprisonment, and other potential penalties. It also specifically addressed in three separate places limitations on the Defendant's ability to withdraw his guilty plea: 1) it clarifies in underlined script that Mr. Leland will not be permitted to withdraw his guilty plea if the court determines mandatory minimum periods of imprisonment applied; 2) it states he will not be permitted to withdraw his guilty plea if the Government does not recommend he receive acceptance; and, 3) it confirms if the court were to reject the sentencing recommendations of the parties, he would not be thereby permitted to withdraw his guilty plea. (Docket No. 207 at 3, 4, 5). Mr. Leland makes no claim the Government has breached the terms of the plea agreement. *Transcript of Oral Argument* at 36; *compare United States v. Tilley*, 964 F.2d 66, 69-71 (1st Cir. 1992). This Court concludes the plea agreement in this case "casts further doubt" on the merits of his motion. *Gonzalez*, 202 F.3d at 24.

F. Prejudice to the Government

It is unnecessary to address the possibility of prejudice to the Government, since this factor must be weighed only if the Court concludes the defendant would otherwise be entitled to withdraw his guilty plea.

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[16] *Transcript of Rule 11 Hearing* at 18-19.

III. CONCLUSION

William Leland's motion to withdraw his plea of guilty is DENIED. The Motion is untimely and the Defendant has failed to present a fair and just reason for withdrawal.

SO ORDERED.

Dated this 7th day of April, 2005

/s/ John A. Woodcock, Jr.
JOHN A. WOODCOCK, JR.
UNITED STATES DISTRICT JUDGE